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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

—v.—

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated,

Appellees.

BRIEF FOR THE LEGAL AID SOCIETY OF SAN MATEO COUNTY, AS *AMICUS CURIAE*

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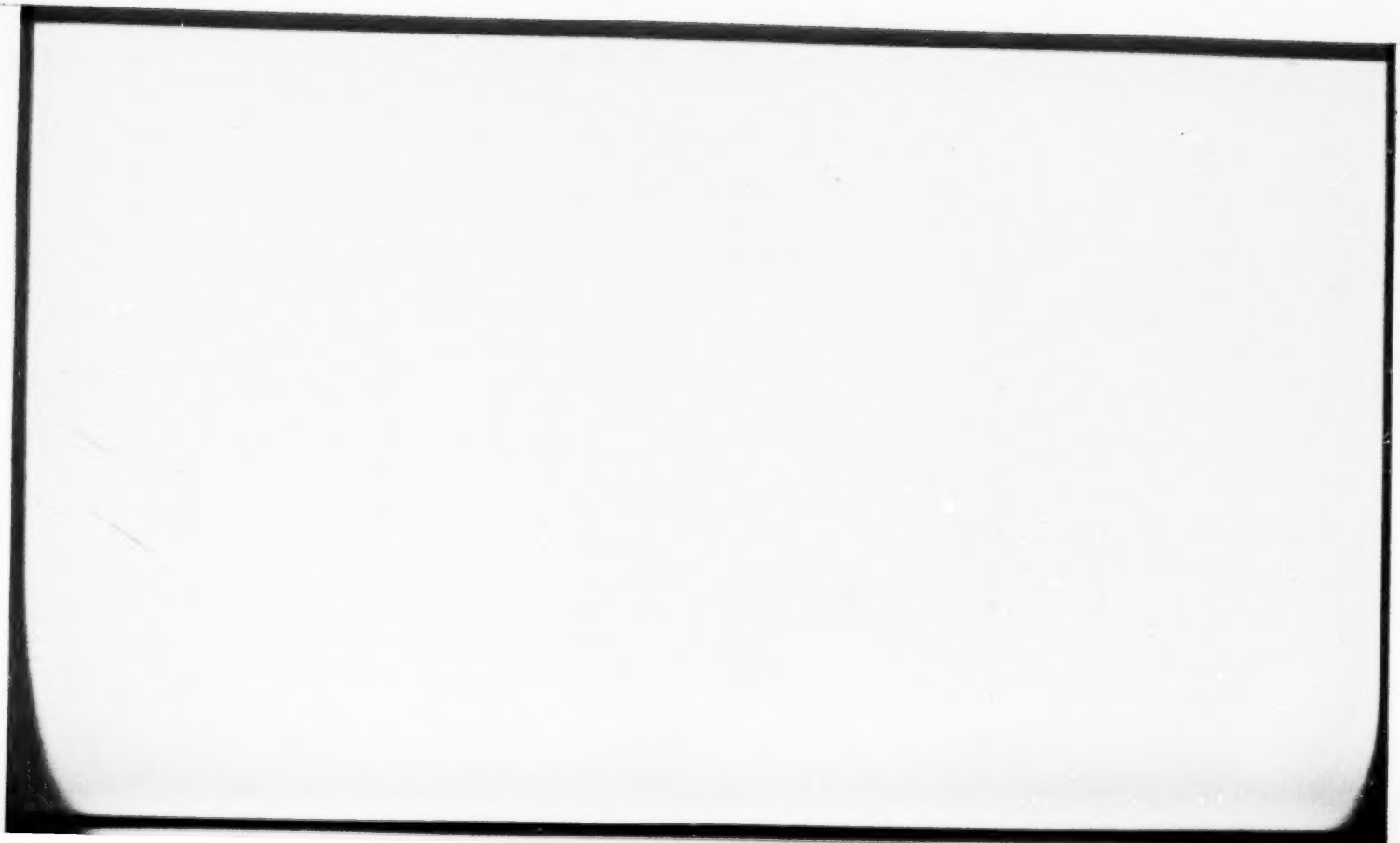


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GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

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Appellees.

BRIEF FOR THE LEGAL AID SOCIETY OF SAN MATEO COUNTY, AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Legal Aid Society of San Mateo County is an O.E.O. federally funded organization which renders legal assistance to the poor, who are unable, on account of poverty, to employ and engage legal aid on their own behalf. Most of our clients receive public assistance, and it has been a central function of the Society to secure and protect their rights in the administration and implementation of the welfare program. We recently participated before this Court in the case of *Lewis v. Martin*, 25 L.Ed.2d 561 (1970).

The Society is deeply concerned that fundamental constitutional protections should not be denied welfare recipients solely because they are on welfare and necessarily depend on the state for daily sustenance. We therefore strongly support the decision of the court below which guarantees Fourth Amendment protection to persons on welfare.

The parties have consented to the filing of an *amicus curiae* brief by the Legal Aid Society of San Mateo County. Copies of their letters of consent will be submitted to the Clerk with this brief.

SUMMARY OF ARGUMENT

The purposes of determination of eligibility and safeguarding the welfare of the child, asserted by New York as reasons for making the welfare home visit, do not justify the relaxation of the Fourth Amendment requirement of a warrant.

There is no justification to lessen or change the traditional standard of probable cause for the issuance of the warrant for most welfare home visits. In only one instance, where visual verification in the home is absolutely essential, the standard admits of minimal change.

The Department of Health, Education and Welfare, through regulation, does not permit home visits to be made without consent, except in connection with quality control of an experimental simplified determination of eligibility program.

ARGUMENT

The immediate issue for decision in this case is whether the Fourth Amendment requirement of a search warrant is applicable to welfare home visits. If the Court determines that a warrant is required for home visits, it may also wish

to address the question of the circumstances under which such a warrant could constitutionally issue. *See Camera v. Municipal Court*, 387 U.S. 523, 534-39 (1967). We discuss these points, respectively, in Parts I and II *infra*. In Part III, we make an additional point: that the judgment below must be affirmed because a binding federal regulation, applicable to all federally assisted welfare programs, forbids unconsented home visits, whether or not supported by a warrant, and thereby impliedly forbids state coercion of consent to home visits.

I. In the Absence of Valid Consent, a Welfare Home Visit Not Supported by a Warrant Violates the Fourth Amendment.

The point is not worth debating whether a welfare home visit is a "search" within the meaning of the Fourth Amendment. Obviously, every unconsented entry by a government agent into an individual's home is a Fourth Amendment "search."[1] Appellants' brief in this Court does not contend otherwise.

It is also plain, we think, that with a few "jealously and carefully drawn exceptions", *Jones v. United States*, 357 U.S. 493, 499 (1958), the fundamental rule of the Fourth

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1. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958) Pursuant to this purpose, every sort of entry by public authorities into private premises has been subjected to Fourth Amendment restraint: entries to search for and to seize illicit objects, *United States v. Jeffers*, 342 U.S. 48 (1951); *Chapman v. United States*, 365 U.S. 610 (1961), entries to arrest persons, *Johnson v. United States*, 333 U.S. 10 (1948); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), entries to converse with inhabitants, *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940), entries to conduct regulatory inspections, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967), and welfare searches, *Parrish v. Civil Service Commission*, 66 Cal. 2d 260, 425 P.2d 223 (1967).

Amendment requires that any entry into an individual's home "must rest upon a search warrant." *Stoner v. California*, 376 U.S. 483, 486 (1964). An unbroken line of cases in this Court makes indisputably clear that the warrant requirement is the very heart of the Amendment. *See e.g., Agnello v. United States*, 269 U.S. 20, 32 (1925). *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Chapman v. United States*, 365 U.S. 610, 613-15 (1961); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Chimel v. California*, 395 U.S. 752, 762 (1969); *Vale v. Louisiana*, 38 U.S.L.W. 4544 (June 22, 1970)

For this reason appellants are wrong when they quarrel with the court below for requiring that a "compelling state interest" be shown to justify a warrantless home entry. (A.127). Such a ruling is not, as appellants suggest, a dubious importation of First Amendment principles into the Fourth Amendment. (Appellants' brief, pp. 16-18). The court below did not hold that "a compelling state interest" must be shown to authorize a search, but rather that a "compelling state interest" must be shown to authorize the allowance of a class of warrantless searches: that is, as the court expressly phrased it, to authorize "creation of a general exception to the Fourth Amendment's warrant requirement." (A.127) This is traditional and unquestionably proper Fourth Amendment law. It is exactly what this Court said in *Chimel v. California, supra*, 395 U.S. at 762: "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . .' "[2]

---

2. Apart from cases of consent, which appear to rest upon the concept of waiver of Fourth Amendment rights, *See Amos v. United*

So the question in this case, as the court below quite properly saw it, is whether New York has made the showing of compelling need for a power of warrantless home entries that will justify exemption from the warrant requirement. "[T]he question is not whether the public interest justifies the type of search in question," *Camara v. Muincipal Court, supra,* 387 U.S. at 533, but rather whether the governmental purposes New York seeks to achieve justify an exemption for welfare home visits from the

> one governing principle, justified by history and by current experience, [that] has consistently been followed: except in carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. (*Camara v. Municipal Court, supra,* 387 U. S. at 528-29).

We turn now to the governmental purposes New York asserts in its Brief: determination of eligibility, and safeguarding the welfare of the child.

States, 255 U.S. 313 (1921); *Johnson v. United States,* 333 U.S. 10 (1948); *Stoner v. California,* 376 U.S. 483 (1964); *Bumper v. North Carolina,* 391 U.S. 543 (1968), each of the few recognized exceptions to the warrant requirement has in fact been limited by this Court to situations in which a compelling governmental need for warrantless search appeared. The "moving vehicle" exception of *Carroll v. United States,* 267 U.S. 132 (1925), was so limited in *Preston v. United States,* 376 U.S. 364 (1964), and *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); the exception for searches incident to arrest recognized in *United States v. Rabinowitz,* 339 U.S. 56 (1950), was thus limited in *Chimel v. California,* 395 U.S. 752 (1969); and of course the "hot pursuit" or "exigent circumstances" exception of *Warden v. Hayden,* 387 U.S. 294 (1967), is inherently so limited. Except for *Warden v. Hayden, supra,* and a very few search-incident-to-arrest cases, *e.g., Harris v. United States,* 331 U.S. 145 (1947) (overruled in *Chimel supra*), this Court has never sustained a warrantless dwelling entry under the Fourth Amendment.

A. DETERMINATION OF ELIGIBILITY.

"The required home visit is an *aid* in determining eligibility.... It is a means of assuring that funds are allocated only to persons who are eligible for them, that they are allocated to the extent to which they are necessary and that they are used for the purpose for which they are allocated...." (emphasis ours), (Appellant Wyman's brief, p. 19). We do not deny that the welfare department has a legitimate interest in protecting its funds. We do deny that this interest compels warrantless entries into welfare homes, when the home visit is admittedly only an "aid" in determining eligibility, not the primary source[3] nor the only source. The welfare department has innumerable available alternative means of determining and verifying eligibility.[4]

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3. "In determining initial and continuing eligibility: Applicants and recipients will be relied upon as the primary source of information upon which the agency's decision is made about their eligibility." *Federal Handbook of Public Assistance Administration*, Part IV, § 2200(e)(1).

4. "A listing of all items which are required [for a determination of eligibility] could be furnished and applicant could bring them to the agency office." [Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York, A.69] The items referred to above such as bank books and birth certificates could be brought to the welfare office; residence can be checked either by a lease, or if that is unavailable (Appellant Wyman's brief, p. 30) a rent check or rent receipt can be requested, or the mailbox can be checked. It belies reason for the welfare department to insist that the home visit is required. To be sure, it may be more expedient to make the home visit, but we are dealing here with the withdrawal of a vital constitutional right which cannot be erased by mere showing of expediency. Nor can the home visit be justified by the few, if any, items which must be visually verified, such as the need for a new mattress. (Appellant Wyman's brief, p. 23). New York does not now have that problem as they have discontinued special needs. *Rosado v. Wyman*, 397 U.S. 397 (1970). In any event, we do not assert that a home visit may not be made on those few occasions; but only that it be made with a search warrant. The standard of proof necessary for the warrant's issuance will be discussed in Part II.

The justification fades entirely with the recognition that anything discovered in the home which might establish ineligibility could be used as the basis for a welfare fraud prosecution.[5] This brings the welfare home visit directly

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5. Apart from general theft prosecutions, all the states in the union prosecute specifically for welfare fraud; indeed, at least ten states deem welfare fraud a felony and penalize accordingly. The Code of Ala. tit. 49, § 17 (21) (1969); Alas. Stat. tit. 47, §§ 47.25.280, .290 (1962); Ariz. Rev. Stat. tit. 45, § 46-215 (1962); Ark. Stat. Ann. tit. 83, § 83-137 (1960); Cal. Welf. and Inst. Code §§ 11482, 11483, 12103, 12850 (1966); Colo. Rev. Stat. ch. 119-2-21 (1963); Conn. Gen. Stat. Ann. tit. 17, §§ 17-102, -132 (1963); Del. Code Ann. tit. 31, ch. 23, § 2317 (1953); D.C. Code Encyclopaedia tit. 3, § 3-216 (1966); Fla. Stats. Ann. tit. 28, § 409.36 (1959); Code of Ga. Ann. tit. 99, § 99-9904 (1968); Hawaii Rev. Stats. tit. 20, § 346-34 (1968); Idaho Code tit. 56, § 56-227 (1948); Ill. Stat. Ann. ch. 23, § 11-21 (1967); Ind. Stat. Ann. tit. 52, § 52-1404 (1964); Iowa Code Ann. tit. XI, §§ 239.14, 241.19, 241A.12 (1969); Kan. Stat. Ann. ch. 39, § 39.720 (1964); Ky. Rev. Stat. tit. XVII, § 205.225, 205.990 (1969); La. Rev. Stat. tit. 46, § 114 (1970); Me. Rev. Stat. Ann. tit. 22, § 3304 (1964); Ann. Code of Md. art. 88A, § 62 (1969); Mass. Gen. Ann. Laws ch. 707, § 1 (1969); Mich. Stat. Ann. tit. 16, § 16.460 (1970); Minn. Stat. Ann. §§ 256.31, 256.68, 256.83 (1959); Miss. Code Ann. tit. 25, § 7183 (1953); Ann. Mo. Stat. tit. 12, § 208.200 (repealed) (now tit. 38, §§ 560.156, .161; Rev. Code of Mont. tit. 71, § 71-226 (1962); Laws of Neb. ch. 394, § 5 (1965); Nev. Rev. Stat. tit. 38, §§ 425.240, 425.250, 427.280 (1967); N.H. Rev. Stat. Ann. tit. XII § 167.17 (1964); N.J. Stat. Ann. tit. 2A, ch. 111, § 2A:111-3 (1969); N.M. 1953 Stat. Ann. ch. 13, § 13-1-32 (1953); N.Y. Consol. Laws bk. 52A, Art. 5, § 145 (1966); Gen. Stat. of N.C. ch. 108, § 108-48 (1969); N.D. Century Code Ann. tit. 50 §§ 50-09-23, -07-38 (1960); Ohio Rev. Code Ann. tit. 51, § 5107-99 (1954); Okla. Stat. Ann. tit. 56, §§ 147, 185 (1969); Ore. Rev. Stat. tit. 34, §§ 411.620, 411.660 (1969); Pa. Stat. Ann. tit. 62, § 481 (1968); Gen. Laws of R.I. tit. 40, § 40-9-18 (1969); Code of Laws of S.C. tit. 71, § 71-66 (1962); S.D. Compiled Laws Ann. tit. 28, §§ 28-7-20, -8-18, -9-15 (1967); Tenn. Code Ann. tit. 14, §§ 14-221, -320, -523, -709 (1969); Tex. Stat. Public Welfare Act of 1941, art. 695c, § 34 (1964); Utah Code Ann. tit. 55, § 55-15-31 (1969); Vt. Stat. Ann. tit. 33, ch. 26, § 2583 (1969); Code of Va. tit. 63.1, § 63.1-124 (1968); Rev. Code of Wash. tit. 74, § 74.08.331 (1965); W. Va. Code ch. 9, § 9-11-11 (1969); Wis. Stat. Ann. ch. 49, §§ 49.12, .34 (1969); Wyo. Stat. tit. 42, § 42.21 (1969).

in line for receipt of traditional Fourth Amendment criminal search requirements, which have indeed been imposed in *Parrish v. Civil Service Commision of the County of Alameda,* 66 Cal.2d 260, 425 P.2d 223 (1967), a case involving a welfare search. In holding that the Fourth Amendment was violated by the warrantless welfare search, the court in *Parrish* had no recourse but to distinguish *Frank v. Maryland,* 359 U.S. 360 (1959), which had not yet been overruled. Two central distinguishing factors were found, both involving the criminal overtones of the welfare search.[6] The *Parrish* court asserted first, that the evidence sought in *Frank* would not itself have afforded a basis for criminal prosecution, while in the welfare search it would have. Second, it was clear that the welfare search was utilized to seek evidence of ineligibility for the purpose of cancelling welfare benefits, and this, the *Parrish* court found, was the same as seeking evidence for forfeiture; the *Frank* Court itself distinguished between searches which advance the general welfare without recourse to criminal proceedings, and searches for evidence to be used in criminal prosecution or forfeiture. *Parrish v. Civil Service Commission of the County of Alameda, supra,* 66 Cal. 2d at 266-67, 425 P.2d at 227-28.

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6. "If the *Frank* distinction between the criminal and noncriminal searches should fall, the county's contention [that a warrant was not required] would of course collapse. Although two cases now pending before the United States Supreme Court (*Camara v. Municipal Ct. of San Francisco No. 92; See v. City of Seattle No. 180* [prob. juris noted (1966) 385 U.S. 808 [17 L.Ed. 2d 50, 87 S. Ct. 31]]) raise the question of whether the *Frank* doctrine should be overruled, we may assume for present purposes that the Court will adhere to its holding in *Frank*, since, as we explain below, we do not find that holding controlling under the circumstances here before us." *Parrish v. Civil Commission of the County of Alameda, supra,* 66 Cal. 2d at 266, n. 7, 425 P.2d at 227 n. 7.

To be sure, the welfare search in *Parrish* was the home visit taken to an extreme, but the time of day, and number of homes involved do not make constitutional differences. The Fourth Amendment warrant has been held to be required in single, non-violent entries, *Amos v. United States,* 255 U.S. 313 (1921); periodic civil administrative inspections, *Camara v. Municipal Court,* 387 U.S. 523 (1967), as well as mass fishing expeditions, *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966).

Considering that there are alternative means [illegible] mining eligibility, and that the home visit entry m[illegible] in criminal prosecution, we find it hard to accept Judge McLean's opinion that the warrant will "introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust." (Dissenting Opinion below, A.136). A hostile relationship is built into a system which forces a welfare family to submit to periodic intrusions into its home without the basic constitutional protections afforded society in general, and more so when these invasions may lead to forfeiture of basic subsistence and criminal prosecution.[7] Further, there can be no doubt that confidence and

7. Judge McLean entirely overlooks the very essence of the Fourth Amendment protection. "It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Boyd v. United States,* 116 U.S. 616, 630 (1886). The sanctity of a man's home is at issue here. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality. . . . That we are often 'captives' outside the sanctuary of the home . . . does not mean we must be captives everywhere. . . . The asserted right . . . stops at the outer boundary of every person's domain." *Rowan v. U.S. Post Office Dept.* 38 U.S.L.W. 4343, 4346 (May 5, 1970).

trust exist only when deserved, and will not survive demeaning tactics and procedures. (Affidavits of Welfare Recipients, A.33-56).

We reach the conclusion that determining eligibility does not compel an exemption to the warrant requirement of the Fourth Amendment.

B. SAFEGUARDING THE WELFARE OF THE CHILD.

The second primary purpose, posited by appellants as justifying the reasonableness of a warrantless home visit entry, is their claim that they are unable to execute their role as guardian and protector of welfare children without it.[8] The federal law, cited as the delegator of this role, is 42 U.S.C. § 602(a)(d)(14). (Appellant Wyman's brief p. 20). That provision, enacted in 1968 as an amendment to the Social Security Act, was designed solely to require the states to make available child-welfare and family services, including, as an example, day-care services for working mothers of dependent children. It has always been and remains the option of the welfare client to accept or reject these social services. (*Federal Handbook of Public Assistance Administration,* Part IV, § 4241).

We cannot comprehend the welfare department's insistence that a warrantless entry must be made into a welfare home to inform recipients or even to encourage recipients to accept the services. (Appellant Wyman's brief at pp. 21-22). The available social services can be discussed and explained as fully in the welfare office as in the recipient's home. The interest, sensitivity and good intentions of the social worker are important and relevant, not the geo-

8. We accept this purpose as stated, even though the Record does not indicate that the child's presence was specially requested by the social worker who asked for a home visit appointment.

graphical site of the discussion; the home venue can add nothing. Contrary to the Walsh affidavit,[9] welfare recipients may be poor, but they are not unaware nor unperceptive of their needs and problems. They know if their furnishings are inadequate, need repair, or if they are living in unsafe conditions. The problem is not lack of knowledge, but lack of funds. The welfare grant has been and remains inadequate to alleviate the hardships they bear. The answer is not to force entry into their homes to study the situation, but rather to increase assistance payments. But this is not the reality of the poor. Their public assistance grant is decreased,[10] and then their condition of poverty is said to justify the withdrawal of their basic Fourth Amendment right to privacy in the home. (Appellant Wyman's brief, p. 22). This vicious cycle is unjust and unsupportable. Welfare recipients already live the indignity of being poor. That hardly justifies a lessening of their constitutional rights which are the birthright of all citizens.

> Does "indigence" . . . constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being with-

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9. Appellant Wyman's brief pp. 21-22, A.70, Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York. The Walsh affidavit asserts in effect that poor persons are incapable of understanding their needs unless those needs are explained and physically pointed out to them by government agents.

10. *See Rosado v. Wyman,* 397 U.S. 397 (1970).

out funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.[11]

We further question and are troubled by the welfare department's assumption that federal law delegates to it the right to assume the role of parent, as outlined in 18 N.Y.C. R.R. § 369.2(c), cited in appellants' brief at p. 20, and referred to by the Walsh affidavit, A.69-70. This was never intended as a federal policy. Rather:

> Parents have the right to make decisions affecting them and the welfare of their children. Similarly children have the right to look to their parents for such decisions. These rights and responsibilities are not abridged lightly, and *only by the courts* when circumstances and conditions pose serious threats to the welfare of the children or reveal serious failure of the parents to provide adequate care and guidance for them. *Federal Handbook of Public Assistance Administration,* Part IV § 4223.1 (emphasis ours)

Some circumstances and conditions, recognized by H.E.W. in its regulation above, pose serious threats to the welfare of the child, and the state can then intervene. Common examples are child abandonment, the battered child situation, and extreme neglect. State intervention in these situations is generally accepted and generally applied to all families, poor or rich. We have no doubt that if a state did much more, and presumed to judge on a periodic basis whether *every* home situation, wealthy or poor, was one where "a child's physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected," such a regime would be declared invalid as an

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11. *Edwards v. California,* 314 U.S. 160, 184-85 (1941) (Mr. Justice Jackson concurring).

unconstitutional invasion of the private realm of family life. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *See Griswold v. Connecticut,* 381 U.S. 479 (1965). Nor do we doubt that singling out one class of persons—poor persons in need of A.F.D.C. assistance—for state regulation in regard to such matters as the "moral well-being" and preservation of "religious faith" of their children must be immediately condemned as an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Yet New York not only presumes thus to dictate the conditions of private life of welfare families, and *only* of welfare families; it also seeks to support warrantless invasions into welfare homes in order to enforce its dictates. The violation of two constitutional rights is said to justify withdrawal of a third.

The public outcry which would be unleashed if every man were subjected to such treatment would surely reach the ears of the Gods. But when the welfare recipient cries out, if he is heard at all, the response too often is "beggars can't be choosers." If we wish to survive as a free society, we must eventually recognize that:

> When we degrade welfare recipients, we are eroding the very values we seek to preserve. But it is not merely enlightened self interest, but justice, that demands a new design for social welfare.[12]

The asserted purpose of safeguarding the welfare of the child does not come close to justifying an exemption from the warrant requirement of the Fourth Amendment. We conclude that in the absence of valid consent, a welfare

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12. Reich, *Social Welfare in the Public-Private State,* 114 U. Pa. L. Rev. 487, 493 (1966).

home visit not supported by a warrant violates the Fourth Amendment.[13]

II. Probable Cause Standard for the Welfare Home Visit Warrant.

When this Court held that a warrant was required under the Fourth Amendment for civil health and safety code-inspections, the circumstances deemed appropriate for the warrant's issuance were different from the traditional requirements of probable cause for criminal searches. *Camara v. Municipal Court, supra,* 387 U.S. at 534-39. The *Camara* opinion makes clear that this was so for essentially two reasons. First, the Court agreed with the need for uniform periodic area inspections in order to "prevent even the unintentional development of conditions which are hazardous to public health and safety" *Camara v. Municipal Court, supra,* 387 U.S. at 535. The inspection program was "aimed at securing city wide compliance with minimum physical standards for private property... because fires and epidemics may ravage large urban areas. . . ." Id. Second, it was obvious that the kind of determination which would underlie the decision to enter a particular building was not susceptible of being made in terms of traditional probable cause. This was so because it was not any state of facts unique to the particular building which was thought to warrant the entry, but

13. It is well established, and does not necessitate lengthy argument, that once a warrant or valid consent is deemed required, the state may not condition the receipt of welfare benefits on a waiver of the recipient's Fourth Amendment protection. *Frost Trucking Co. v. R.R. Comm.*, 271 U.S. 583 (1926); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

rather the enforcement of a system of routine safety checks within a geographic area. Neither of these two considerations apply to welfare home visits.

The notion of general periodic inspections, undertaken without reference to the particularized circumstances of the person or home inspected, was thought in *Camera* to be acceptable in connection with enforcement of the health and safety codes for these reasons:

"First, such programs have a long history of judicial and public acceptance."[14] The same is not true for welfare home visits. The Social Security Act has only been in effect for about 35 years; during this time, Congress has never required or approved of the home visit. With the one exception of a control group within a simplified experimental method of determining eligibility, H.E.W. has not approved the home visit, *see* Part III *infra*. Finally, no court has ever approved the constitutionality of the warrantless home visit. *Parrish v. Civil Service Commission of the County of Alameda, supra; James v. Goldberg*, 302 F.Supp. 478 (S.D.N.Y. 1969), A. 119-137.

"Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results."[15] The home visit does not seek out conditions dangerous to health and safety. Its only asserted legitimate purpose is determination of eligibility, and the welfare department has not satisfactorily demonstrated that a periodic home visit is indispensable, or even essential to achievement of this purpose. *See* Part I, *supra* p. 6.

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14. *Camara v. Municipal Court, supra*, 387 U.S. at 537.
15. Id.

"Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[16] The impersonal search for conditions dangerous to health and safety cannot be compared to a home visit. The welfare recipient's whole way of life is open and subject to examination.[17] It is plain that whatever else the home visit may be, it is not impersonal. Further, as shown in *Parrish v. Municipal Court, supra,* and Part I *supra,* at pp. 7-9, the home visit is aimed at the discovery of evidence of crime, and evidence leading to welfare assistance forfeiture.[18]

Since each of these factors, the underpinnings for this Court's finding of reasonableness of periodic area code-enforcement inspections, is inapposite to welfare home visits, a periodic or areawide home visit is inherently unreasonable. Moreover, the purpose for the welfare home visit depends precisely upon the existence in the homes of individual welfare recipients of particularized circumstances, relevant to eligibility, which lend themselves to a traditional probable cause determination. Home visits are undertaken on the belief that a welfare recipient may have evidences of income rendering him ineligible for assistance, or ineligible for his present level of assistance; or on the belief that he may be otherwise guilty of welfare fraud, or guilty of legally actionable child neglect or abuse.

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16. Id.

17. Affidavits of Welfare Recipients, A.33-56; *See also* the purpose the welfare department asserts of safeguarding the morals and preserving the religion of children. Appellant Wyman's brief, p. 20.

18. *See also* the criminal overtones of 42 U.S.C. 602 (a)(16), A.110.

Such beliefs in regard to any individual welfare home are subject to testing by traditional standards of probable cause because—like any other assertions of particular reasons to search a particular place—they depend upon the reasonableness of inferences from known facts concerning what is likely to be found in that place.

There is every bit as much reason to require judicial testing of a social worker's inferences, as the inferences of a police officer. So the traditional determination of probable cause to support a warrant plays its traditional necessary function as applied to the welfare home visit, and should be constitutionally required. *See Parrish v. Civil Service Commission of the County of Alameda, supra.*

One special situation does appear to us to require minimal modification of the probable cause concept. When it is shown that visual verification in the home is absolutely essential, as for example verifying a client's request for a new mattress, the following circumstances can justify the warrant's issuance. First, an affirmative showing must be made that the item does not admit of any alternative means of verification, apart from the home visit. Second, the warrant must specify and be limited to the exact item or items to be viewed. And third, since traditional probable cause requirements are absent, and the warrant would not support a search for ineligibility or fraud, reasonable notice to the welfare recipient should be required. Only in this way will the legitimate interests of the welfare department be served with due regard and respect for the fundamental right of privacy of the welfare recipient.

In conclusion, we are sure that in a vast number of cases consent to the home visit will be given voluntarily; indeed, a visit may even be requested by the recipient. But

we see no compelling or valid reason here to lessen the Fourth Amendment protection for an entire class of poor persons.

III. A Binding and Valid H.E.W. Regulation Forbids States from Making Home Visits Without the Consent of the Welfare Recipient.

The Department of Health, Education and Welfare has promulgated regulations to curb the indignities occasioned by home visits:[19]

> The policies and procedures for taking applications and determining eligibility for assistance or other services will be consistent with program objectives; will respect the rights of individuals under the United States Constitution, the Social Security Act, Title VI of the Civil Rights Act of 1964, and all other relevant provisions of Federal and State laws; and will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights. [*Handbook of Public Assistance Administration,* Pt. IV, § 2200(a).]
>
> The [State] agency especially guards against violation of legal rights and common decencies in such areas as *entering a home by force, or without permission,* or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers, or papers, to seek clues to possible deception. (emphasis ours) [*Handbook of Public Assistance Administration,* Pt. IV, § 2300(a).]

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19. When a Federal law or regulation modifies or limits the operation of a practice, this does not mean approval of the practice. *Shapiro v. Thompson,* 394 U.S. 618, 639 (1969). Here the Federal limitations were occasioned by the abuses leading to *Parrish supra,* and other cases.

While H.E.W. regulations do not specially define consent or permission, public assistance administrators have been instructed to carefully consider case law definition.

> The simple presence or absence of words of permission or consent to certain procedures does not dispose of questions of law or propriety, as courts have frequently refused to give effect to purported consent where surrounding circumstances indicate that choice was not free. Therefore, the public assistance agency has a responsibility to be alert to avoid violation of either legal rights or common decencies. [*Handbook of Public Assistance Administration,* Pt. IV § 2400.]

Thus, while the federal regulation requiring consent to a home visit does not have the dimension of a constitutional guarantee, by promulgating § 2400, H.E.W. has shown its intent that the determination of consent is to be made by reference to the constitutional case law governing the issue of consent in search cases. It is well established case law that valid consent must be "unequivocal and specific,"[20] "freely and intelligently given,"[21] "voluntary,"[22] "and not given in response to duress or coercion actual or implied."[23] *See also Amos v. United States,* 255 U.S. 313, 317 (1921); *Johnson v. United States,* 333 U.S. 10, 13 (1948); *Bumper v. North Carolina,* 391 U.S. 543, 550 (1968).

In the welfare area, the threat of termination of benefits is exactly the kind of coercion that nullifies any legal effectiveness of apparent consent. *Parrish v. Civil Service Commission of the County of Alameda, supra,* 66 Cal.2d at 270-

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20. *Karwicki v. United States,* 55 F.2d 225, 226 (4th Cir. 1932).

21. *Kovach v. United States,* 53 F.2d 639 (6th Cir. 1931).

22. *Phelpher v. Decker,* 401 F.2d 232, 236 (5th Cir. 1968).

23. *Judd v. United States,* 190 F.2d 649, 651 (D.C. Cir. 1951); for a general discussion of the law of consent, *See United States v. Smith,* 308 F.2d 657, 663-4 (2d Cir. 1962).

272, 425 P.2d at 230-231. Nor can the receipt of welfare benefits be conditioned upon the waiver of a federal right. *McCulloch v. Maryland,* 17 U.S. 316 (1819); *Nash v. Florida Industrial Commission et al.,* 389 U.S. 235 (1967). A state "should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits ...." *Nash v. Florida Industrial Commission et al, supra,* 389 U.S. at 239. A right created by H.E.W. may not be avoided or conditioned by a state in any manner. *King v. Smith,* 392 U.S. 309 (1968), *Lewis v. Martin,* 25 L.Ed. 2d 561 (1970).

Appellants seem to accept the regulation, and others of H.E.W. as being mandatory and required (Appellant Wyman's brief, pp. 27-28.) Indeed, citing from the regulation they state: "Finally, this policy protects a client from an agency worker: 'entering a home by force, or without permission . . .'" (Appellant Wyman's brief, p. 28). We can only conclude that the welfare department misunderstood the regulation when they terminated benefits after consent to a home visit was refused.

Apart from the constitutional infirmities (discussed in Part I *supra*), if the federal government decides to change its policy somewhat, and require a home visit in a Quality Control System of an experimental Simplified Method for Determination of Eligibility (Appellant Wyman's brief, pp. 24-26) they may do so. The Federal government promulgated § 2300(a), and the Federal government can modify it; the state cannot. Apart from the Quality Control Group connected with the experimental program, home visits made without valid consent are prohibited and illegal.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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